IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-6067

LAWRENCE WATTS,

Petitioner,

-v.-

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIOARI TO THE
SUPREME COURT OF LOUISIANA

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STATE OF LOUISIANA,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on October 1, 1975, rehearing refused, October 31, 1975.

CITATIONS TO THE OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at --La.--, 320 So. 2d 146 (1975), and is set out in Appendix A hereto, pp. 1a-10a, infra.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on October 1, 1975, rehearing refused, October 31, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

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QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of aggravated rape under the law of Louisiana violates the Eighth or Fourteenth Amendment to the Constitution of the United States

2. Whether the failure of petitioner's trial counsel to object to the exclusion for cause of veniremen with equivocal scruples against capital punishment, in possible violation of the Sixth and Fourteenth Amendments, constituted a waiver of the said question for the purpose of appellate review.

3. Whether the exclusion for cause of two veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana:

> La. Rev. Stat. Ann. §14:27 (1974). "Attempt.
> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.
> C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.
> D. Whoever attempts to commit any crime shall be punished as follows:
> (1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than twenty years. . ."

* La. Rev. Stat. Ann. §14:41 (1974). "Rape defined.

> Rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, [sic] the offender, committed

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without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."

* La. Rev. Stat. Ann. §14:42 (1974). "Aggravated rape. Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
(1) Where the female resists the act to the utmost, but her resistance is overcome by force.
(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense.
Whoever commits the crime of aggravated rape shall be punished by death."

* La. Rev. Stat. Ann. §14:43 (1974). "Simple rape. Simple rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
(1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of mind produced by an intoxicating narcotic or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.
(2) Where she submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.
(3) Where she is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity.
Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years."

La. Rev. Stat. Ann. §15:567 (1967). "Conditions precedent to execution; warrant of governor.
No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1967). "Execution of death sentence; prior confinement of convict.

The warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, shall execute the criminal in conformity with the death warrant issued in the case. Until the time of his execution, the convict shall be kept in solitary confinement at the Louisiana State Penitentiary at Angola and no one shall be allowed access to him without an order of the court except the officers of the prison, his counsel, his physician, his spiritual adviser, his wife, children, father, mother, brothers and sisters."

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La. Rev. Stat. Ann. §15:569 (1967). "Place for execution of death sentence; manner of execution. Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1974 supp.) "Officials and witnesses present at execution; minors excluded. Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann. art. 598 (1974 supp.). "Effect of verdict of lesser offense. When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann. art 798 (1968). "Causes for challenge by the state. It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
(1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or unconstitutional;
(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or
(3) The juror would not convict upon circumstantial evidence."

La. Code Crim. Proc. Ann. art. 803 (1967). "Same (General charge; scope); charge as to included minor offenses and plea of insanity. When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense . . ."

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La. Code Crim. Proc. Ann. art. 809 (1967).
"Judge to give jury written list of responsive verdicts.
After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

* La. Code Crim. Proc. Ann. art. 814 (1974 supp.).
"Responsive verdicts; in particular.
A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are: . . .
8. Aggravated Rape:
Guilty.
Guilty of attempted aggravated rape.
Guilty of simple rape.
Not guilty . . . ."

La. Code Crim. Proc. Ann. art. 817 (1974 supp.)
"Qualifying verdicts.
Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

La. Code Crim. Proc. Ann. art. 841 (1966).
"When bill of exceptions must be reserved.
An irregularity or error in the proceedings cannot be availed of after verdict unless it is objected to at the time of its occurrence and a bill of exceptions is reserved to the adverse ruling of the court on such objection. Failure to reserve a bill of exceptions at the time of an adverse ruling of the court operates as a waiver of the objection and as an acquiescence in the irregularity or ruling.
This requirement shall not apply to:
(1) A ground for arrest of judgment under Article 859, or the court's ruling on a motion in arrest of judgment; or
(2) The court's ruling on a motion for a new trial based on the ground of bills of exceptions reserved during the trial."

La. Code Crim. Proc. Ann. art. 841 (1975 supp.).
"Bill of exceptions unnecessary; objections required.
An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court and the grounds therefor.
The requirement of an objection shall not apply to the court's ruling on any written motion."

La. Code Crim. Proc. Ann. art. 844 (1966). "Formal bills of exceptions; signing; contents.
A. The appellate court shall consider only formal bills of exceptions which have been signed by the trial judge in conformity with Article 845. In a case where the death sentence has been imposed, the appellate court, to promote the ends of justice, may consider bills that have not been timely signed by the trial judge.
B. A formal bill of exceptions shall contain only the evidence necessary to form a basis for the bill, and must show the circumstances and the evidence upon which the ruling was based. When the same evidence has been made part of another bill of exceptions, the evidence may be incorporated by reference to the other bill. Evidence as to guilt or innocence can only be taken down and transcribed as provided by law."

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La. Code Crim. Proc. Ann. art. 920 (1975 supp.).
"Scope of appellate review.
The following matters and no others shall be considered on appeal:
(1) An error designated in the assignment of errors; and,
(2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence."

* Note: On July 17, 1975, the Louisiana Legislature approved HB No. 617, HB No. 618, SB No. 400, (App. B. pp. 11a-14a), establishing the crime of forcible rape and providing that the crime of rape be defined "on both heterosexual and homosexual terms."

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STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on October 1, 1975, rehearing refused, October 31, 1975, affirming petitioner's conviction and death sentence. Petitioner, Lawrence Watts, a twenty-four year old black man, was sentenced to death on July 15, 1974, in the Sixteenth Judicial District Court, St. Mary Parish, Louisiana, after being convicted of one count of aggravated rape.

The State's evidence showed that on January 16, 1974, Kathleen Stone, a nineteen year old white woman from California, was visiting some high school classmates at their home in Morgan City, Louisiana. Trans., Vol IV, p. 390. Miss Stone had arrived in Morgan City two days earlier, and had spent the night of January 14, 1974, at the home of a Mrs. Lavergne, and then spent the night of January 15 at the home of her classmates, Debbie and Martha Trosclair. Id. at 414.

On the morning of January 16, 1974, the Trosclairs had left their home for work, leaving Miss Stone sleeping. Id. at 392. Miss Stone testified that at approximately 10:30 a.m., she was awakened by the bed shaking and that she discovered a strange man lying on top of her back. Id. at 416-417. The stranger was said to have pushed the blankets over her head, and to have threatened Miss Stone with death if she did not cooperate. Miss Stone testified that the rapist then placed a knife at her throat, and proceeded to rape her. The rapist then told Miss Stone to keep her eyes closed, and to turn over. Miss Stone complied, and the rapist proceeded to rape her again, reaching orgasm this second time. Id. at 395-397.

After the acts of intercourse, according to Miss Stone, the rapist asked her to play the guitar for him, and Miss Stone obliged, all of this time keeping her eyes closed. Id. at 429-430. Shortly thereafter, the telephone began to ring, and the rapist permitted Miss Stone to answer the phone. Id. at 431.

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Miss Stone testified that she went to answer the phone, in a remote part of the apartment, with her eyes closed. Id. at 431. Miss Stone had no recollection of the rapist leading her to the phone. Id. at 432. She reached the phone after seven or eight rings, but by then the caller had hung up. Id. at 432.

After returning from the phone, Miss Stone was allowed to open her eyes, whereupon she saw what appeared to be welding gloves near a nightstand. She did not see the rapist wearing the gloves, but testified that she didn't think they belonged to the Trosclairs. Id. at 433-435.

Shortly afterwards, Martha Torsclair returned on her lunch hour, but could not enter since the chain was on the front door downstairs. The rapist allowed Miss Stone to admit Miss Trosclair while he hid in a bedroom closet. Id. at 435.

Miss Stone went downstairs and admitted Miss Trosclair. Miss Stone testified that she did not attempt to flee at that time since she feared that the rapist had discovered a gun belonging to Miss Trosclair's roommate, and that he would shoot her as she fled. Id. at 435-438.

Miss Trosclair proceeded to the kitchen where she began to prepare lunch. Id. at 440. Miss Stone then asked Miss Trosclair to help her find a job, and Miss Stone proceeded into the bedroom, in which the rapist was secreted, to dress. Id. at 441.

Miss Stone and Miss Trosclair then left the house, leaving the rapist in the closet. When the women arrived at a local store, they remembered that Debra Trosclair would also be coming home for lunch, and called the apartment to warn her. Id. at 442. Debra Trosclair met the women at the store, and they called the Trosclairs' mother, who in turn called the police. Id. at 406.

The women then returned to the apartment, and sat in their car in front to await the arrival of the police. Id. at 244-248.

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When the police arrived, the women entered the apartment with them. Thereupon, a note was discovered on the bed which said "I'll meet you outside at eight," or something to that effect. Id. at 407-408.

Police investigation discovered the rapist's weapon, a butcher knife belonging to the Trosclairs, lying on top of a kitchen counter. Id. at 260. The petitioner's fingerprints were not found on the knife. Id. at 260. The welding gloves seen by Miss Stone (not seen on petitioner's hands) were not found in the apartment. Id. at 264. A piggy bank belonging to the Trosclairs was missing. Trans., Vol. III, p. 252.

The police determined that the rapist had entered through a rear, first floor window which was pried open with an iron bar. Petitioner's fingerprints were not found on either the bar or the window. Id. at 244-248.

During the course of their investigations, an unknown caller phoned the apartment, asking to speak with Miss Stone. Believing that this caller was the rapist, the police had a policewoman impersonate Miss Stone to the caller, who subsequently identified himself as John Smith. Id. at 248-252.

The subject of rape was not mentioned. The policewoman voiced qualms about getting pregnant, and the caller replied that she wouldn't. The policewoman also demanded the return of the Trosclair's money. The policewoman informed the caller that no police action would be taken if he returned the money. A meeting was arranged for that evening. Trans., Vol IV, p. 383-386. These conversations were tape recorded by the police. Id. at 276.

The policewoman, a detective and Miss Stone proceeded to the rendezvous. While the police officers waited inside, Miss Stone was to wait outside, and drop her purse as a signal that she had spotted the rapist. Id. at 278.

Thereupon, the petitioner approached Miss Stone. She asked leave to go inside to buy some cigarettes, and then reported to the officers. The officers arrested the petitioner

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and led him over to Miss Stone who identified him as the rapist. Id. at 410-411.

Subsequent police examination of the Trosclair apartment did not disclose the presence of petitioner's fingerprints on either the knife allegedly used in the rape, or on the window and its surroundings through which the rapist was said to have entered the apartment.

A search of petitioner's automobile produced a pair of welding gloves which Miss Stone testified as having been in the apartment during the rape. Id. at 264. Also, particles of green ceramic said to have been a piggy bank were also taken from petitioner's car. Id. at 263.

A medical doctor who examined Miss Stone on the day of the rape testified that the examination indicated no abrasions, bruises, lacerations or tears to Miss Stone's perineum, but that a vaginal wash had produced positive evidence of intercourse. Id. at 368. The doctor further testified that at the examination -- approximately two hours after the rape -- Miss Stone was fairly calm, and did not appear to be in hysteria or shock. Id. at 369-370. The doctor additionally noticed no bruises to any other portion of Miss Stone's body. Id. at 370-371.

On advice of counsel, the petitioner did not take the stand. Mrs. Josephine Watts, the petitioner's mother, was the only defense witness, and her testimony was confined to the search of her home following the petitioner's arrest. Id. at 451-453.

After a 90-minute deliberation, the petitioner was found guilty of aggravated rape by an all-white jury consisting of eleven men and one woman.

On October 1, 1975, the Supreme Court of Louisiana affirmed petitioner's conviction and sentence, with one Justice dissenting on the ground that the death sentence was imposed in violation of Furman v. Georgia, 408 U.S. 238 (1972). A timely rehearing petition was refused on October 31, 1975.

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HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's motion in arrest of judgment, based on the contention that his death sentence was in violation of the Eighth and Fourteenth Amendments, Trans., Vol. I, p. 43 (July 12, 1974), was denied by the trial court, id. at Vol IV, p. 9. Petitioner's Bill of Exception Number Seven assigned this ruling as error, and petitioner briefed the issue on appeal to the Louisiana Supreme Court, Brief of Appellant, State v. Watts, La. Sup. Ct. No. 56,229, at 11. That Court rejected the claim on its merits, one Justice dissenting, -- citing its decision in State v. Selman, 300 So.2d 467 (1974), as being controlling. The claim was raised again in petitioner's rehearing application, Application for Rehearing, State v. Watts, La. Sup. Ct. No. 56,229, at 2, and this application was refused without opinion, on October 31, 1975.

II. Petitioner's trial counsel failed to object to the exclusion of two veniremen for cause due to the veniremen's expressed scruples against capital punishment. Petitioner's counsel on appeal to the Louisiana Supreme Court sought to have this exclusion considered as being violative of petitioner's Sixth and Fourteenth Amendment rights, despite the fact that the same was not assigned as error at petitioner's trial. Supplemental Appellant Briefs, State v. Watts, La. Sup. Ct. No. 56,229. The Louisiana Supreme Court held that appellate review of this unreserved error was impossible: "Our statutory procedure will not permit us to review this contention." State v. Watts, 320 So.2d 146, at 153 (1974), appendix A at p. 8a. The petitioner's claim was reviewed in his application for rehearing, in which he claimed that the holding of this Court in Wigglesworth v. Ohio, 403 U.S. 947 (1971) required state appellate courts to consider such an objection regardless of its lack of assignment of error, Application for Rehearing, State v. Watts, La. Sup. Ct. No. 56,229, pp. 2-3, and this application was denied without opinion.

III. Despite the lack of objection to the exclusion of the two veniremen, petitioner's appellate counsel advanced the argument that the said exclusion was in violation of petitioner's rights

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under the Sixth and Fourteenth Amendments. First Supplemental Appellant Brief, State vs. Watts, La. Sup. Ct. No. 56,229, pp. 2-5. The Louisiana Supreme Court declined to consider this issue, on the grounds discussed in No. II, supra. In a footnote to the opinion, the Court viewed the State's argument as being persuasive--that the decision of Witherspoon v. Illinois, 391 U.S. 510 (1968) does not apply to convictions in which the death sentence is mandatory. State v. Watts, 320 So.2d 146, at 153 (1975) appendix A at 8a. One Justice disagreed with this footnote in a separate concurrence. Id. at 154-55, (Tate, J., concurring). The petitioner renewed his claim in his application for rehearing, Application for Rehearing, State v. Watts, La. Sup. Ct. No. 56,229, p. 2, but the application was refused without opinion.

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REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED RAPE UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

In the interest of avoiding lengthy and repetitious briefing, the petitioner adopts the first "Reason for Granting the Writ" section of the Petition for Certiorari to the Supreme Court of Louisiana, Selman v. Louisiana, No. 74-6065, (O.T. 1974, filed February 24, 1975), at pp. 17-44, and each of the issues set forth therein:

(A) Whether the perpetuation of arbitrary sentencing discretion under the new Louisiana Capital Punishment laws following Furman v. Georgia, 408 U. S. 238 (1972) violates the constitutional rule of that case.

(B) Whether the excessiveness, disproportionateness and aberrancy of the death penalty for the crime of aggravated rape when the crime entails no considerable bodily injury violates the Eighth Amendment.

(C) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth Amendment.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER EXCLUSION OF DEATH-SCRUPLED VENIREMEN FOR CAUSE CONSTITUTES A WAIVER OF THE ISSUE FOR THE PURPOSE OF APPELLATE REVIEW.

The record below presents an important issue concerning appellate review of the exclusion of persons who oppose capital punishment from service on trial juries in capital cases tried under a purportedly "mandatory" death-sentencing procedure where the defendant's trial counsel failed to make a timely objection to the exclusion.

Despite the lack of objection to the exclusion of the veniremen, petitioner's appellate counsel briefed the issue and presented it to the Louisiana Supreme Court for consideration. That Court declined review due to the lack of a timely objection.

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Petitioner respectfully submits to this honorable Court, as he did to the Court below, that it is immaterial that petitioner's trial counsel raised no contemporaneous objection to the exclusion of death-scrupled veniremen, since "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) (emphasis added). Jury selections in violation of the Witherspoon requirements "necessarily undermines 'the very integrity of the . . . process' " leading to imposition of the death sentence, id. at 523, n. 22; and this Court has permitted attacks upon numerous death sentences despite the lack of contemporaneous objection to for-cause challenges that violated Witherspoon. See, e.g., Boulden v. Holman, 394 U.S. 478 (1969); Maxwell v. Bishop, 398 U.S. 262 (1970); Wigglesworth v. Ohio, 403 U.S. 947 (1971); Harris v. Texas, 403 U.S. 947 (1971). Significantly, the lower court decisions reversed in the latter two cases had held Witherspoon error waived because of the absence of timely objection. State v. Wigglesworth, 18 Ohio St.2d 171, 248 N.E. 2d 607 (1969); Harris v. State, 457 S.W.2d 903 (Tex. Crim. App. 1970).

The Louisiana Supreme Court's refusal to consider petitioner's objections appears to be a departure from this Court's holdings in Wigglesworth and Harris, supra, and thereby, to be violative of petitioner's rights under the Sixth and Fourteenth Amendments. 320 So.2d at 153 (App. A at 8a). That refusal presents an issue of general significance, which should be determined by this Court.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF TWO VENIREMEN ON THE GROUNDS OF THEIR EXPRESSED ATTITUDE TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS, UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The record below presents important issues concerning the constitutionality of excluding persons who oppose capital

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punishment from service on trial juries in capital cases under an allegedly "mandatory" death-sentencing procedure. Notwithstanding Witherspoon v. Illinois, 391 U.S. 510 (1968), the Supreme Court of Louisiana, in a footnote to its opinion herein, gave tacit approval to the State's arguments in favor of the exclusion of two veniremen: "The state's position on this issue incidentally is a persuasive one." 320 So.2d at 153 (App. A at 8a). That holding presents issues of general significance which should be determined by this Court.

A. The Test of Exclusion Applied by the Trial Court Did Not Meet the Minimum Standards Required by the Constitution as Construed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

Several questions concerning the application of Witherspoon are presented by this case, for that decision held that "[i]f the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than [that outlined in Witherspoon] . . . , the death sentence cannot be carried out." 391 U.S. at 522 n. 21 (emphasis added). See also Maxwell v. Bishop, 398 U.S. 262, 266 (1969); Boulden v. Holman, 394 U.S. 478, 482 (1968). In the latter case, this Court extended the Witherspoon holding to disallow exclusion of veniremen who stated that they did not "believe in" capital punishment or expressed "fixed opinions" against its infliction:

> It is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case. 394 U.S. at 483-4.

In Funicello v. New Jersey, 348 A.2d 181 (1968) rev'd 403 U.S. 948 (1971), this Court cited Witherspoon, Boulden and Maxwell in reversing a decision of the Supreme Court of New Jersey, making it clear that ambiguous objections to a question

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relating to a venireman's ability to impose the death penalty shall not be grounds for exclusion. (e.g., the venireman's response: "I don't think so.") See also, Segura v. Patterson, 402 F.2d 249 (10th Cir., 1971), rev'd 403 U.S. 946 (1971); Pemberton v. Ohio, --N.E.2d--(1971), rev'd, 403 U.S. 947 (1971).

First, the exclusion of veniremen Gaudet and Foster was in clear violation of the Witherspoon prohibition against exclusion for "voic[ing] general objections to the death penalty or express[ing] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, supra, at 522. Venireman Gaudet was excluded on the basis of the following examination:

Now, Mr. Gaudet, I'll ask you some questions first. What is your occupation, sir?
A. (Mr. Gaudet) I'm a boat skipper.
Q. Are you self employed or employed by someone?
A. (Mr. Gaudet) I'm employed by Mr. Guzzetta at Offshore Marine Service.
Q. And how long have you been employed by Mr. Guzzetta?
A. (Mr. Gaudet) It'll be nine years this November.
Q. Are you a native of Morgan City or the Morgan City area?
A. (Mr. Gaudet) Yeah. I was born in Pierre Part but I been living in Ward 9-- I'd say about thirty-five years are more.
Q. Are you married, sir?
A. (Mr. Gaudet) Yes, sir.
Q. Do you have children?
A. (Mr. Gaudet) Yes, sir; four children.
Q. Mr. Gaudet, did you understand my reading of this definition of rape and aggravated rape?
A. (Mr. Gaudet) Yes, sir.
Q. Do you know of any reason-- Do you have any feelings about that statute-- any reason that you would not like to see that statute enforced?
A. (Mr. Gaudet) Well, I really think--- I can't see a death penalty for it in one way. I wouldn't actually vote on that.
Q. You say that you could not vote for the death penalty for aggravated rape?
A. (Mr. Gaudet) That's right. I know it's a serious crime.
Q. Is your statement that no matter what the evidence was presented here that you could not vote to convict because of the death penalty?
A. (Mr. Gaudet) I will give you one reason now. It's embarrassing on my part but I had-- of course, I don't know if I should say this or not-- but I had a brother that was charged at first. Then the charge was reduced later on. The way I felt towards him, I mean I'd like to see him get out even if he would've went to court. Then the charge was later dropped because they found evidence where he exactly wasn't guilty.
Q. For that reason---
A. If I would have to vote, ever since then, it kind of put doubts in my mind.
Q. Well, can you put aside in your own mind what personal incident may have happened, could you put that out of your mind and listen to this case on the facts that come up here; and if the facts justify it, could you vote for the death penalty?

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A. Not on rape, I don't think so. No, sir.

BY MR. LEONARD:

Your Honor, I would like to enter a challenge for cause.

BY THE COURT:

Mr. Gaudet, you understand that the law of this state is such that whoever is proven guilty beyond a reasonable doubt of the commission of the crime of aggravated rape, if he is charged with that crime; whoever is proven guilty beyond a reasonable doubt of that crime, the law provides that that person should be put to death. Now, as a juror, you would be called upon to listen to the evidence in the case and to weigh the evidence and consider the evidence and if you find that the State through its District Attorney, has proven the defendant's guilt beyond a reasonable doubt of that crime, then to bring in a verdict of guilty. Of course, if you find that they have not proved it, you would likewise be bound to either bring in one of the other verdicts or even a verdict of not guilty. The law would require, in order for you to be able to serve on a jury, that you put aside whatever personal feelings you have and to consider the case strictly on the basis of the evidence which you will hear in the courtroom and the law which I will give you at the conclusion of the trial. If you feel you can do that, you can serve. If you feel that because your own views are of such a strong nature and possibly because of your family involvement in another matter that you cannot do this, then you cannot serve as a juror.

BY MR. GAUDET:

That's what I'm afraid of. I know-- Like I say, I know it's a serious crime and a man would have to vote-- I'll have to vote guilty and in that case, I mean if it's proven that he had committed the crime, sir.

BY THE COURT:

You don't feel that you could put aside those feelings and vote on the basis of the law and the evidence.

BY MR. GAUDET:

I don't think so.

BY THE COURT:

All right. You are excused. You may go. You are excused finally.

Veniremen Foster was excluded on the basis of the following examination:

Q. Did you understand my reading of this statute on rape and aggravated rape?
A. (Mr. Foster) I understood the statute very well.
Q. Do you have any prejudice or any reason that you would not like to see that statute enforced?
A. (Mr. Foster) Well, my personal reason is, viewing the reason and hearing the reason, I don't think I could give a decision for capital death. I don't believe.
Q. It is your statement then that no matter what the evidence would show, that if it showed that the defendant was guilty beyond a reasonable doubt, you still could not vote for the death penalty.
A. (Mr. Foster) Not the death penalty on rape.
Q. No matter what evidence would be presented.
A. (Mr. Foster) No, because that crime is so flexible, I don't think I could render a verdict, you know, on the death penalty.

BY MR. LEONARD:

Your Honor, I would challenge for cause.

BY THE COURT:

Do you understand that the law provides that whoever is found guilty beyond a reasonable doubt of the commission of the crime of aggravated rape shall be put to death. That's what the law of this state is. That's what the people of this state have said, acting through their legislators. As a juror, you would be required to listen to the evidence and to accept the law from the court and to decide, if you had found that the defendant had been proven guilty beyond a reasonable doubt of the crime charged, to render a verdict of guilty, which would mean that he would be sentenced to death. Now, could you put aside any personal feelings that you have and accept this as a statement of law and, if you were convinced of his guilt beyond a reasonable doubt, to bring in a verdict of guilty?

BY MR. FOSTER:

I don't think I could, Your Honor, because I have a family. I would like to listen to the views in the case as such, but I wouldn't be satisfied of being a part of the decision of the death penalty.

BY THE COURT:

You are excused. You may go.

The examination of both Mr. Gaudet and Mr. Foster went beyond a general inquiry into the veniremen's beliefs, and the trial judge did inform them of their duty as a citizen to sit as a juror if at all possible. Nevertheless, in each examination, in response to the judge's instructions on their duty, the veniremen expressed feelings which may, at the very least, be termed equivocal:

> MR. GAUDET: I know-- like I say, I know it's a serious crime and a man would have to vote-- I'll have to vote guilty and in that case, I mean if it's proven that he had committed the crime, sir. Trans., Vol III, p. 253. (emphasis added.)

> MR. FOSTER: I don't think I could, Your Honor. I would like to listen to the views in the case as such, but I wouldn't be satisfied of being a part of the death penalty. Trans., Vol III, p. 260 (emphasis added).

Mr. Gaudet's recognition of his duty to vote guilty, and his later statement that he didn't think he could comply with that duty; and Mr. Foster's expression of dissatisfaction at the prospect of returning a capital verdict clearly do not comport with the Witherspoon test and the related decisions which followed it. If Witherspoon has any application to capital trials in which the jury purportedly does not decide the issue of punishment the trial court's exclusion of these two

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veniremen was reversible error.[1]

Second, the Court should decide whether Witherspoon allows the exclusion for cause of a juror who expresses conscientious scruples against the imposition of the death penalty for rape, in a case where the victim was not otherwise injured. Both veniremen Gaudet and veniremen Foster were excluded, not for objections to the death penalty in all cases, but for scruples against its imposition for the crime of rape.

> MR. GAUDET: Not on rape, I don't think so, No, sir. Trans., Vol. III, p. 25.
>
> MR. FOSTER: Not the death penalty on rape.
>
> * * *
>
> No, because that crime is so flexible. I don't think I could render a verdict, you know, on the death penalty. Trans., Vol. III, p. 33.

The veniremen's responses indicate the operation of a selective judgment in applying the death penalty, and, as in Witherspoon, "it cannct be assumed that a juror who describes himself as having 'conscientious scruples' against the infliction of the death penalty in 'a proper case' thereby affirms that he could never vote against the imposition of capital punishment no matter what the trial might reveal . . ." 391 U.S. at 516, n. 9

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1. The Court of Appeals for the Fifth Circuit has recognized that the number of veniremen wrongfully excluded on account of scruples against the death penalty is irrelevant:

> The magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society; indeed, many agree on moral or religious grounds that it is incomprehensible that an advanced society such as ours should yet engage in such practice. Given the weightiness of the subject involved it really does not follow that the improper exclusion of a relatively small number of the total veniremen examined does not prejudice the defendant's rights to an impartial cross-section of the community. Where, as here, unanimity of decision is required to impose the death sentence, the stark reality is that one improperly excluded juror may mean the difference between life or death for a defendant. Although a defendant certainly has no assurance that a properly empaneled jury will not impose the death penalty, it seems to us that in light of the vast difference in treatment which may result from the improper

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B. The Questioning By the State of Veniremen Concerning Their Views on Capital Punishment Under The Louisiana Mandatory Sentence Scheme Deprived Petitioner of His Fourteenth Amendment Rights to Due Process and Equal Protection.

In the State's argument on the issue of exclusion of veniremen, though it argued that the veniremen's responses met the Witherspoon criteria, its major argument was that Witherspoon does not apply to cases where the jury has no discretion in sentencing:

> Defendant's arguments might have merit if the jury had had the right to qualify its verdict to without capital punishment. It did not. The jury in the case at bar did not decide the penalty. The penalty in this case was mandatory. All the jury had to decide was the issue of guilt. Therefore, the Witherspoon arguments advanced by the defendant . . . simply do not apply . . . . State's Supplemental Brief, State v. Watts, La. Sup. Ct. No. 56,229, at 3.

This is the major argument advanced by the State which the Supreme Court of Louisiana noted as being "persuasive."[2] Though it appears logical on its face, the argument leads to several untenable results, as noted by Associate Justice Tate in his separate concurrence. State v. Watts, 320 So.2d 146, at 154-55 (App. A, at 9a-10a.)

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1. Cont'd.

> exclusion of a single venireman, even that degree of error is prejudicial to the rights of a defendant in a capital case. Marion v. Beto, 434 F.2d 29, 32 (5th Cir. 1970). This Court has reversed convictions when only three veniremen were wrongfully excluded, Segura v. Patterson, 403 U.S. 946 (1971), rev'g 402 F2d 246 (10th Cir. 1968); Ladetto v. Massachusetts, 403 U.S. 947 (1971), rev'g 254 N.E. 2d 415 (1969); and a number of other courts have held that the wrongful exclusion of a single venireman was reversible error. Woodards v. Maxwell, 303 F. Supp. 690 (S.D. Ohio 1969); People v. Schader, 80 Cal. Rptr. 1, 457 P.2d 841 (Sup. Ct. 1969); In re Hillery, 79 Cal. Rptr. 773, 457 P.2d 656 (Sup. Ct. 1969). In the instand case, of course, nine other veniremen were excluded.

2. 320 So.2d, at 153.

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That the jury is not, in reality, concerned with the sentence its verdict entails is indeed an artificial and unrealistic proposition, since, as Justice Tate observed, "we reason from formula and abstraction and not from human reality and responsibility if we say that the jury is not concerned with the penalty to be imposed as a result of the verdict it agrees on." 320 So.2d at 155 (App. A, at 10a).

But even accepting the State's argument on its face, the argument presents two substantial Fourteenth Amendment problems which should be considered by this Court.

First, the Court should decide whether state inquiry into a venireman's belief in capital punishment violates a defendant's rights to due process by allowing the State examination latitude in voir dire that is not similarly accorded the defense. If, as the State argues, the jury is unconcerned with sentencing, the questioning of veniremen on sentencing is irrelevant and improper. Should any venireman be unaware of the sentence a guilty-as-charged verdict would carry, the same would be painfully obvious following voir dire.

When the jury is concerned solely with the adjudication of guilt, courts have generally held that neither defense counsel nor the prosecutor will be allowed to inquire into matters which are not directly relevant to this issue. Although "[p]reservation of the opportunity to prove actual bias is a guarantee of the defendant's right to an impartial jury," Dennis v. United States, 339 U.S. 162, 171-172 (1950), numerous cases have held that where a venireman states that he can render an impartial verdict based solely on the evidence produced at trial, in absence of unusual circumstances, defense counsel will be precluded from inquiring into particular matters which might affect the venireman's impartiality. See, e.g., Connors v. United States, 158 U.S. 408 (1895). With respect to the issue of punishment, courts have not only refused to permit defense inquiry, but have almost uniformly held that, even where a mandatory sentence is involved, counsel will not be permitted to

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refer to punishment when speaking to the jury. See, e.g., Chapman v. United States, 443 F.2d 917 (10th Cir. 1971); State v. Harris, 258 La. 720, 247 So.2d 847 (1971).

Under the holding of State v. Harris, supra., inquiry into a venireman's views on punishment is forbidden, and, a fortiori, death-qualification is forbidden as well. Furthermore, if the defense is precluded from an inquiry into punishment and other issues not related to guilt, but the prosecution is allowed death-qualification, there would be a violation of Due Process in that the rules of the voir dire are structured so as to afford the prosecution an advantage in jury selection which is not afforded to the defense. See Wardius v. Oregon, 412 U.S. 400 (1973).

Second, the Court should consider whether death-qualification in mandatory capital cases results in a violation of Equal Protection for capital defendants, since it is only in capital cases that the prosecution is permitted to exclude veniremen because of their views on punishment. In non-capital cases, the prosecution is precluded from discussing punishment with veniremen, to the protection of the defendants therein. Capital defendants are accorded no similar protection. Such is a denial of Equal Protection: "A State has accorded bedrock procedural rights to some, but not to all similarly situated." Stanley v. Illinois, 405 U.S. 645, 658 n. 10 (1972). See Bower v. Vaughan, 400 U.S. 884 (1970), aff'g 313 F.Supp. 37 (D.Ariz. 1970). There is no reason why a venireman's views on punishment are more relevant in capital cases than in non-capital ones. The State has afforded the procedural right of precluding prosecutorial inquiry on views of punishment to non-capital defendants, thereby denying capital defendants the Equal Protection of the law.

C. The Exclusion of Veniremen with Conscientious Scruples Against Capital Punishment Deprived Petitioner of His Sixth Amendment Right to A Representative Jury.

Witherspoon was decided only a few days after Duncan v. Louisiana, 391 U.S. 145 (1968); and the cases in which this

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Court has since applied Witherspoon have all been pre-Duncan cases (see DeStefano v. Woods, 392 U.S. 631 (1968))or cases in which no Sixth Amendment contention was made against death qualification. See Boulden v. Holman, 394 U.S. 478 (1968); Maxwell v. Bishop, 398 U.S. 262 (1970); and the twenty-three cases reversed on authority of Witherspoon in 403 U.S. at 946-948 (1971). At the time Witherspoon was tried, the right to jury trial was governed only by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court had recognized the rights of racial minority defendants to a jury from which members of their minority group were not excluded, see Smith v. Texas, 311 U.S. 128 (1940); Hernandez v. Texas, 347 U.S. 475 (1954), but it had not yet pronounced a general right to have a criminal jury selected from a panel representative of the populace.

The Sixth Amendment, however, entitles a defendant to this kind of jury. In Carter v. Greene County Jury Comm'n., 396 U.S. 320, 330 (1970), the Court held that such a requirement was imposed upon the States by Duncan, stating that the 'very idea of a jury" was that of a "'body truly representative of the community'" (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)) and that jury lists must "'reasonably reflect a cross-section of the population,'" 396 U.S. at 332 (quoting Brown v. Allen, 344 U. S. 443, 474 (1953)).

As the Court has clarified the nature of the "jury" guaranteed in state-court proceedings by the Sixth Amendment, the importance of the cross-section requirement has become increasingly highlighted, and the permissibility of death qualification has become increasingly suspect. Williams v. Florida, 399 U.S. 78 (1970) held that a jury of twelve was not an essential part of the Sixth Amendment right, since the key function of the jury was to provide a group representative of the community which would prevent Government oppression of criminal defendants. "[T]he essential feature of jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation

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and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S. at 100. The Sixth Amendment required only that the jury be large enough "to provide a fair possibility for obtaining a representative cross-section of the community . . ."[3] Ibid. In Apodaca v. Oregon, 406 U.S. 404, 410 (1972), the Court similarly ruled that the Sixth Amendment did not require state juries to reacha unanimous verdict, because the jury's common sense judgment could still be rendered without unanimity "as long as it consists of a group of laymen representative of a cross section of the community."

The principle that no identifiable group may be systematically excluded from jury panels is not limited to cases involving race: see White v. Crook, 251 F. Supp. 401, 408-409 (M.D. Ala. 1966) (exclusion of women); Labat v. Bennett, 365 F.2d 698 (5th. Cir. 1966), cert. denied, 386 U.S. 991 (1967) (exclusion of wage earners); State v. Schowgurow, 240 Md. 121, 213 A.2d 475 (1965) (exclusion of agnostics and atheists).

> "Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

Hernandez v. Texas, 347 U.S. 475, 478 (1954). As the Court reiterated in Apodaca v. Oregon, supra, at 413, the Sixth Amendment forbids "systematic exclusion of identifiable segments of the community from jury panels," and all such groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

The Court also recognized in Witherspoon that jurors with scruples against the imposition of the death penalty form a coherent and sizeable group in most communities from which juries are selected. It is unclear how large this class is, but it is clearly quite substantial. In Witherspoon, the Court took

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3. The Court remarked the fact that in capital cases, no State provided for less than twelve jurors; it concluded that in death cases, this fact "suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." 399 U.S. at 103.

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judicial notice of a 1967 poll in the International Review on Public Opinion[4] and concluded that "less than half" of the people in the United States "believe in the death penalty." 391 U.S. at 520. A 1969 Gallup poll showed that 40% of those interviewed said they opposed imposition of the death penalty.[5]

Since all jurors resolutely opposed to the death penalty were systematically excluded from petitioner's post-Duncan jury panel, the issue is presented here whether this wholesale, categorical exclusion of a sizeable portion of potential jurors may be justified under the exacting standards of the Sixth Amendment as incorporated into the Fourteenth by Duncan. Admittedly, a defendant may not object under the Sixth Amendment to the exclusion for cause of veniremen who are related to him or who have a monetary interest in the outcome of his suit because of the danger that such veniremen, if selected as jurors, would bring to bear on the jury's deliberations attitudes inconsistent with their proper duty as jurors to determine the truth impartially. It is the rightful duty of the jury, however, to express community attitudes about punishment: "one of the most important functions any jury can perform . . . . is to maintain a link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Witherspoon v. Illinois, supra, at 520 n. 15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). The Court should determine, therefore, whether a criminal defendant is entitled to a jury panel which reflects a fair cross section of community sentiment about the death penalty - a panel from which veniremen such as Veniremen Gaudet and Foster cannot be excluded for cause.

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4. Polls, International Review of Public Opinion, Vol. II, No. 3, at 84 (1967).

5. Bronson, "On the Conviction Proneness and Representativeness of the Death-Qualified Jury; An Empirical Study of Colorado Veniremen," 42 U. Col. L. Rev. 1, 1 n. 2 (1970).

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CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX "A"

nal Procedure, gave notice that it intended to introduce into evidence "a confession or inculpatory statement" made by defendant. Complaint is made that two confessions were admitted at trial, one confession written and signed in defendant's own hand, and one typewritten and signed by defendant. Defendant contends he relied on the fact that only one confession was to be used at trial. Therefore, he suffered prejudice in the preparation of his defense. We find no merit in this contention.

Upon arrival in Morgan City, defendant made an oral statement relating to the events of the night of the crime. No secretary being available at that time, he wrote the statement out in longhand and signed it. As he was finishing it, the secretary arrived. Defendant then dictated a more detailed statement to the secretary who immediately typed it for his signature. In essence, these two inculpatory statements were the same, the latter being merely a more detailed version.

By way of an application for a bill of particulars, defendant sought information as to whether the state had in its possession any statements made by defendant, either verbal or in writing, which it "intends to use at the trial." The state answered "Yes." Well in advance of trial, defendant also filed a motion for oyer seeking to have the state furnish defendant with "copies of all written confessions and other written statements" made by defendant. Thereafter, a motion to suppress all written confessions was filed and set for hearing. The record of this hearing held on July 12, 1974 (some ten days prior to trial) shows that the state had previously furnished copies of the confessions to defendant in response to the prayer for oyer. During this hearing, the manner in which defendant had executed the two statements was explored in detail.

In view of the state's affirmative response indicating its intent to use at trial statements made by defendant, together with the fact that copies of the two confessions, as well as the details relating to their confection, were in the possession of defendant prior to the time that the state gave notice as required by article 768, we conclude that defendant was not surprised nor prejudiced in the preparation of his defense. Consequently, there is no reversible error.[2] Assignment of Error No. 3 is without merit.

DECREE

For the reasons assigned, the conviction and sentence are affirmed.

WEST HEADNOTE SYSTEM

STATE of Louisiana

v.

Lawrence T. WATTS.

No. 56220.

Supreme Court of Louisiana.

Oct. 1, 1975.

Rehearing Denied Oct. 31, 1975.

Defendant was convicted in the 16th Judicial District Court, Parish of St. Mary, Edward A. Delahoussaye, III, J., of aggravated rape and he appealed. The Supreme Court, Calogero, J., held that identification of defendant by victim in front of a store where she had gone to meet the defendant, who had already raped her, pursuant to telephone call which she had received from defendant was not a one-on-one confronta-

2. Technical deficiencies in the notice required by article 768 of the Code of Criminal Procedure do not constitute grounds for reversal unless an accused is surprised or prejudiced thereby. *State v. Sneed*, La., 310 So.2d 572 (1975). *See also State v. Watley*, 301 So.2d 332 (La.1974); *State v. Normand*, 298 So.2d 803 (La.1974); *State v. Coates*, 273 So.2d 202 (La.1973).

tion and was not unduly suggestive as police officers did nothing to indicate to victim which of the many men entering the store might be a suspect; that pair of gloves found during search of defendant's automobile during execution of search warrant was properly admitted notwithstanding the fact that they were not listed in the warrant as things to be seized, and that imposition of the death penalty was not unconstitutional.

Affirmed.

Tate, J., concurred and filed an opinion.

Dixon, J., concurred in part and dissented in part and filed an opinion.

1. Criminal Law ⇐339

Procedure whereby police officers prevailed upon victim of rape to be at a certain place where attacker had indicated in telephone call that he wanted her to be so that he could talk to her, whereby police arrested defendant when he approached the victim and was identified by her, and whereby, at defendant's request, the victim was called upon to make the identification in defendant's presence was not an impermissible one-on-one identification but rather was part of an investigation and capture and was not unduly suggestive as the police in no way implied to the victim that the person whom she identified was the rapist.

2. Criminal Law ⇐412.1(2)

Evidence of statements which defendant made when he called apartment in which he had raped victim was properly admitted into evidence even though the telephone was answered by a policewoman and even though defendant was not given his Miranda warnings before he was permitted to engage in conversation on the telephone with the policewoman, whom he believed to be his victim.

3. Searches and Seizures ⇐2

Where search warrant was issued and search was conducted before the effective date of the Louisiana Constitution of 1974, its provisions were inapplicable. LSA-Const.1974, art. 1, § 5.

4. Searches and Seizures ⇐3.3(4)

Evidence obtained in the proper execution of a restricted search warrant issued on probable cause is admissible notwithstanding the fact that such evidence was not specified in the warrant; validity of such seizure is based on the "plain view" doctrine, which allows seizure of evidence or contraband coming within the officer's view as long as he had prior justification to be in a position to have that view. U.S.C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Searches and Seizures ⇐3.3(6)

Where search warrant directed officers to seize $50 in cash, a piggy bank, and a certain pair of pants and a shirt, and since any of the items could have been hidden under automobile seat, so that police officer was justified in searching that location, pair of gloves which were found during that search were properly seized under the "plain view" doctrine as the police officer had a right to be in the automobile where he located the gloves. U.S.C.A.Const. Amend. 4.

6. Rape ⇐64

Imposition of death penalty upon defendant convicted of aggravated rape was not unconstitutional despite contention that the jury could have returned a responsive verdict of attempted rape or simple rape, neither of which carried the death penalty. LSA-R.S. 14:42; U.S.C.A.Const. Amends. 8, 14.

7. Criminal Law ⇐1053

Failure of defendant to reserve a bill when two jurors were excused for cause

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although they allegedly did not make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to the evidence operated as waiver of the objection. LSA–C.Cr.P. arts. 841, 920.

8. Criminal Law ⇐1053

Alleged error of trial court in excusing for cause two jurors who did not make it unmistakably clear that they would automatically vote against imposition of capital punishment without regard to the evidence was not an error discoverable by a mere inspection of the pleadings and proceedings and thus not reviewable in the absence of a bill of exceptions. LSA–C.Cr.P. art. 920(2).

Garland R. Rolling, Metairie, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Knowles M. Tucker, Dist. Atty., Edward M. Leonard, Jr., Walter J. Senette, Jr., Asst. Dist. Attys., for plaintiff-appellee.

CALOGERO, Justice.

On June 6, 1974 defendant was indicted by a grand jury for an aggravated rape, in violation of La.R.S. 14:42, which purportedly occurred on January 16, 1974 in Morgan City. Trial was held on July 8 and 9, 1974 and defendant was found guilty by a twelve man jury. In accord with the provisions of La.R.S. 14:42, defendant was then sentenced to the penalty of death.

Defendant has appealed to this Court, relying on four assignments of error in seeking to have his conviction and sentence reversed. In addition, he contends that selection of the jury was done in a manner violative of the constitutional principles expressed in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and he asks us to consider this alleged error of constitutional magnitude, despite the failure of trial counsel to object during examination and selection of the jury.

FACTS

The victim, a 19 year old girl who was in Morgan City on vacation visiting friends, was alone, asleep in a girl friend's apartment when she was awakened at approximately 10:30 a.m. by the shaking of her bed. A male voice ordered her to shut up, and the intruder placed a butcher knife to her throat, telling her that he would kill her if she did not submit. He then proceeded to rape her twice.

The victim had been ordered to keep her eyes closed, but after the rape was completed, the intruder allowed her to open her eyes and they had a conversation lasting about five minutes. During this time, the victim obtained a good look at the intruder.

The conversation was terminated when one of the victim's friends, a resident of the apartment in which the rape occurred, returned home for lunch. The intruder hid in a closet. The victim went downstairs, admitted her friend, went back upstairs to the bedroom, changed from her night gown to her clothing, and then fled the apartment with her friend. The police were called, but the rapist had escaped by the time the police arrived at the apartment. A broken window screen in a vacant downstairs apartment suggested the means of entry to the dwelling. A note, reading "Meet me tonight out in front of the house at eight" was found on the victim's bed.

During the afternoon, various police officers remained in the apartment investigating the rape. A female police officer was summoned to the apartment after one of the male officers answered a telephone call only to hear the caller hang up without speaking. It was decided that this patrolwoman would answer the telephone thereafter and would impersonate the victim in

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the hope that the caller might be the rapist. She took a call from a person who identified himself as "Roy" and related that he was a friend of "John Smith," the man who had been there that morning. Roy apologized for Smith's behavior, saying that Smith's mind was messed up and that he really was not the way he appeared to be that morning. About two hours later, the patrolwoman answered another call and recognized the voice as that of the same Roy. This time the caller identified himself as John Smith. He again apologized for what had happened that morning and attempted to arrange a meeting for that night so that he could return $50.00 which he had taken from the apartment. A meeting place was not immediately agreed upon, so the patrolwoman asked him to call again later. A third call was received about 7:30 p.m. and it was then agreed that the meeting would be at 8:00 p.m. at a small convenience store about a block from the apartment.

The victim agreed to cooperate in an attempt at the store to apprehend the rapist. While the police were stationed inside the store, she stood in front waiting for the rapist to approach. She remained there for about thirty minutes, during which time she viewed between fifteen and twenty black males, including approximately six men who matched the general description of defendant, enter the store. When the defendant approached her, she dropped her purse, which was the pre-arranged signal between her and the police. The victim, however, had moved out of the range of vision of the police and she realized that they had probably not seen the signal. After a brief conversation in which defendant suggested they leave in his car, she told defendant she needed to go into the store to buy cigarettes. Once in the store she informed the police that the rapist was standing outside by a telephone booth.

The defendant was then arrested by the police for rape and was informed that he had been identified. He responded by stating "Well, let her tell me that." Thereupon, the victim was summoned over to the defendant by the officer, and she reaffirmed her identification.

After defendant's arrest, search warrants were obtained for his mother's home, in which he resided, and for his mother's automobile, which he had driven to the store. Incriminating physical evidence was found at the home and in the automobile.[1]

ASSIGNMENT OF ERROR NO. 1.

Prior to trial, defendant filed a motion to suppress the identification, contending that "a one-on-one" identification procedure was used and that such a procedure was impermissibly suggestive and conducive to mistaken identification contrary to due process standards enunciated in *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). After a pretrial hearing, the trial court denied the motion to suppress, whereupon defendant objected to the ruling of the court and reserved a bill of exceptions. Defendant assigns the overruling of this motion to suppress the identification as his first assignment of error.

On the hearing on the motion two police officers attested to the facts discussed hereinabove relative to the calls, the stake-out, the identification and the arrest. The trial judge, in denying the motion, concluded that the identification procedure was a reasonable one, not violative of due process, in that the defendant had not yet been arrested and the identification at the pre-arranged meeting was the best way of apprehending him. He pointed out that the only other course available to the police would have been to arrest all persons fitting the description of the rapist who entered the store or came to the store that

1. This recitation of the facts is obviously not complete, nor intended to be.

night and then display such persons to the victim in a police conducted line-up.

Defendant in brief contends that this latter option is exactly what should have been done. He reiterates his contention that the procedure used was an impermissibly suggestive one-on-one identification procedure.

[1] We disagree with defendant's contention and find no merit in this assignment of error. We find that the procedure used in this case was not a one-on-one identification. As that term has been used, it refers to an identification procedure whereby the police, having a suspect in custody, show the suspect and only the suspect to the victim or witness of the crime. This type of custodial showing, with some few exceptions, has been held to be impermissibly suggestive, in that the victim or witness may well be influenced by the fact that the authorities have the individual in custody, perhaps conveying an impression that he is the culprit. See *State v. Newman*, 283 So.2d 756 (La.1973).

Such a concern is not present in the instant case. The defendant was not in police custody. Furthermore, there was nothing about the procedure employed (actually as much a capture as an identification) which in any way can support an argument that it was suggestive. In no way was it suggested or implied to the victim that defendant was the rapist. Her identification was a completely independent one, based solely upon her memory of the rapist.

This assignment has no merit.

ASSIGNMENT OF ERROR NO. 2.

The defendant filed a pretrial motion to suppress taped recordings of the second and third telephone conversations between the policewoman and the caller who identified himself as "John Smith." Defendant denotes the denial of this motion as assignment of error no. 2.

We note that the tape recordings of the conversation were not played for the jury during trial. The substance of those telephone calls were, however, presented to the jury during the testimony of the policewoman who took the calls. We will therefore address ourselves to defendant's contention that the recordings, i. e., testimony concerning the substance of the telephone conversations, should have been suppressed.

[2] Briefly, defendant's contention is that the statements should have been suppressed because the police investigation had focused on "John Smith" and that defendant, alias Smith, was deceived or induced into making incriminating statements without being informed of certain of his constitutional rights.[2] It is defendant's contention that the principles enunciated in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were applicable, and that "John Smith" should have been informed of his right to remain silent, his right to an attorney, and the other rights required by *Miranda*.

There is no merit to this contention. In *Miranda*, the Supreme Court made it clear that that decision was to govern *custodial interrogations*. The Court stated:

"Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we

2. In brief, defendant states that by advancing this argument, he in no way admits that he was the "John Smith" who made the telephone calls, but merely assumes that to be the case hypothetically, inasmuch as this was apparently the decision of the jury.

mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[2]

"2. This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."

It is apparent in the instant case that this "John Smith," who circumstantially was shown to be defendant, was at the time of the incriminating telephone conversations neither in police custody nor deprived of his freedom in any way. Accordingly, we find no merit in the argument presented here.

ASSIGNMENT OF ERROR NO 3.

Under assignment of error no. 3, defendant presents two alleged errors, the first being the denial of his motion to suppress physical evidence, specifically, a pair of gloves, and the second being the introduction of the gloves into evidence during trial. The gloves were seized during a search of defendant's mother's automobile. Legal authority for the search of the automobile was premised upon both a properly issued search warrant and upon a consent to search form signed by defendant's mother. Defendant disputes the validity of the search under each of those documents.

[3] We shall consider defendant's argument in regard to the search conducted under the authority of the search warrant. Defendant in no way disputes the validity of the warrant, but he does take issue with its execution. The warrant listed three particular things to be seized: 1) $50.00 in cash, 2) a piggy bank, and 3) a certain pair of pants and a shirt. Defendant contends that as the gloves were not specified on the warrant, they were improperly seized in violation of the Fourth Amendment.[3]

[4] We do not find merit in this argument. Evidence obtained in the proper execution of a restricted search warrant issued on probable cause is admissible notwithstanding the fact that such evidence was not specified in the warrant. The validity of such seizure is based on the "plain view" doctrine, which allows seizure of evidence or contraband coming within the officer's view as long as he had prior justification to be in a position to have that view. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Herron*, 301 So.2d 312 (La. 1974).

[5] The gloves in the instant case were found under the front seat of the automobile which was being searched pursuant to the warrant. As any of the items detailed on the face of the warrant itself could easily have been hidden under the car seat, the officers were justified in searching that location, and when they discovered the gloves, which had been earlier described to them by the victim, the officers were legally entitled to seize them.

As we find that the gloves were properly seized during execution of the search warrant, and accordingly were admissible at trial, we need not address ourselves to defendant's alternative argument that seizure of the gloves was invalid due to an alleged defect in the consent form signed by defendant's mother and due to alleged improper execution of this consensual search.[4]

This assignment of error has no merit.

3. Defendant also cites Article 1, § 5 of the Louisiana Constitution of 1974, which requires particularization of the "things to be seized." As the search warrant was issued and the search conducted on or about January 10, 1974, long before the effective date of that Constitution, its provisions are inapplicable. In any event we do not feel that the cited provision would be authority in support of defendant's position.

4. We note in any event that there does not appear to be merit in defendant's argument. His contention that the consent to search

ASSIGNMENT OF ERROR NO. 4.

[6] In his final assignment of error, defendant contends that the trial court erred in denying his motion in arrest of judgment. Defendant argued in that motion that La.R.S. 14:42 is unconstitutional in that its provision for a sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution. Defendant in brief elaborates upon this contention and specifically argues that the constitutional infirmity lies in the fact that the jury may return a responsive verdict of attempted aggravated rape or simple rape neither of which carries the death penalty. Defendant contends therefore that the jury has the power to render the death penalty in a discriminatory manner, all in violation of the constitutional principles expressed in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

This same argument was presented in *State v. Selman*, 300 So.2d 467 (La.1974). The Court in *Selman* stated:

"Finally, we find no substance in the argument that by permitting a jury to render responsive verdicts, there still remains in the jury the uncontrolled discretion to impose the death penalty. The responsive verdicts for aggravated rape are as follows: guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty. The reason for this argument lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape.

"Hence, the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution."

We have additionally upheld the Louisiana death penalty for murder, as contained in La.R.S. 14:30, despite the identical contention that the possibility of responsive verdicts to the charge of first degree murder affords a jury unbridled discretion in the imposition of the death penalty. *State v. Roberts*, La., 319 So.2d 317, decision

form was invalid is based upon the fact that the form is a pre-printed one applicable to search of a house, and while the police scratched out the word house the first time it appeared in the form and substituted the word car, they failed to do so the second time the word house app

In the body of the fo..., the police officer described the automobile by year, make, model, color, license plate number, and motor registration number. The evidence shows that defendant's mother understood she was consenting to a search of her automobile.

The second argument presented is that the consent to search form only gave permission to search to the three officers who were named in the form, and that as the search was actually conducted by another officer, not one of those named in the form, the search and seizure were invalid. The evidence shows that the automobile was in police custody, and that when the officers who went to defendant's mother's house had obtained her consent to search the automobile, they radioed this information to the non-designated police officer, and he then actually conducted the search.

rendered September 5, 1975; *State v. Hill*, 297 So.2d 660 (La.1974).

These prior decisions are controlling. This assignment of error has no merit.

THE WITHERSPOON ISSUE.

While defendant's specifications of errors are limited to the four which we have previously discussed, counsel for defendant in a supplemental brief filed in this Court urges an alleged error of asserted constitutional proportions, namely, that the trial court's excusing two jurors for cause, where they allegedly did not make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to the evidence, constituted a deprivation of due process of law under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Defendant requests that we look at the issue, and suggests that if we do not do so, the federal courts will. He cites in this regard *Wigglesworth v. Ohio*, 403 U.S. 947, 91 S.Ct. 2284, 29 L.Ed.2d 857 (1971).

[7, 8] Our statutory procedure will not permit us to review this contention.[5] We hasten to point out, however, that the defendant does indeed have available to him other possible remedies, such as a petition for a writ of certiorari to the United States Supreme Court, or writ of habeas corpus. We do not mean to imply that we find merit in defendant's argument that *Witherspoon* has been violated here. The state's position on this issue incidentally is a persuasive one.[6]

5. At the time defendant was tried, Article 920 of the Code of Criminal Procedure provided that the Court's review was limited to 1) formal bills of exceptions which had been submitted to and signed by the trial judge, and 2) errors discoverable by a mere inspection of the pleadings and proceedings. In addition, Article 841, C.Cr.P., expressly provided that an irregularity or error could not be availed of after trial unless it was objected to at the time of its occurrence and a bill of exceptions was reserved to the adverse ruling by the trial court. Failure to reserve a bill operated as a waiver of the objection.

It is undisputed that defendant did not object during the voir dire examination or when the two jurors were excused for cause. Defendant's perfected bills of exceptions filed with the trial court did not include a bill of exceptions relative to that issue, and indeed his failure to object at the time the alleged error occurred precluded his filing such a bill. Consequently, that alleged error cannot be reviewed under Art. 920(1). Nor is the alleged error one discoverable by a mere inspection of the pleadings and proceedings, [See *State v. Craddock*, 307 So.2d 342 (La.1975), for a discussion of the type of errors considered discoverable by mere inspection], and therefore it cannot be reviewed under Art. 920 (2).

Shortly after defendant's conviction, the Code of Criminal Procedure was amended, substituting assignment of errors for bills of exceptions. See Arts. 841, 844, and 920. As amended, Article 841 still requires an objection to be made, except to a ruling on a written motion, at the time an error or irregularity occurs. Consequently, under present law we are still unable to review an asserted error such as the one presented in this case.

6. In *Witherspoon*, the Supreme Court held: ". . . a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. . . . To execute this death sentence would deprive him of his life without due process of law." 391 U.S. 510, 522-23, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776.

Accordingly, the only veniremen who are to be excused are:

"those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. 510, 522-23 n. 21, 88 S.Ct. 1770, 1777, 20 L.Ed.2d 776.

The state contends that the two prospective jurors who were challenged for cause were correctly excused under *Witherspoon*, and under Art. 799(2)(b), C.Cr.P., because each of the jurors stated essentially that he would automatically vote against the imposition of capital punishment without regard to any evi-

DECREE

Because we have found no merit in the four assignments of error and in view of our procedural limitation which preclude review of the issue raised in brief concerning a possible *Witherspoon* issue, we affirm conviction and sentence of the defendant.

MARCUS and BARHAM, JJ., concur.

TATE, J., concurs and assigns reasons.

DIXON, J., concurs in part and dissents in part and assigns written reasons.

TATE, Justice (concurring).

I concur in the majority opinion, except in that portion which notes as possibly "persuasive" the state's position relative to a *Witherspoon* violation. See footnote 6.

The state contends that, since the jury is no longer concerned with whether a death penalty is exacted, the defendant cannot complain of the exclusion from service of jurors with ambivalent but not fixed opinions against capital punishment. To the contrary, it seems to me, that neither the state nor the defense can, on their attitude toward the death penalty, question or exclude jurors, *if* we accept the state's argument that the jury has nothing whatsoever to do with the imposition of the death penalty.

The state's suggestion seems to me to be unrealistic and untenable that the jury's only concern is to select from the responsive verdicts, without regard that one of them means that the accused will be executed.

The artificial and unrealistic basis of this argument is shown by the care the state used to exclude from service on this jury those veniremen with doubts or conscientious scruples against imposition of the death penalty. If indeed the veniremen have no concern with the penalty their verdict will cause the accused, then the state should be indifferent to the private attitude of veniremen against the death penalty.

Logically also, it follows, questioning of veniremen on the subject by either the state or the accused is irrelevant. Likewise, the excusal for cause of a juror because of his views against capital punishment would be reversible error, as depriving an accused of the services of a cross-section of the population on the jury without legal cause.

I do not believe the state will accept these logical consequences of its argument that a *Witherspoon* violation is immaterial because of the jury's alleged lack of function with regard to imposition of a penalty.

dence that might be developed at the trial of the case.

The state's principal contention, however, is that *Witherspoon* was not applicable to the jury selection in defendant's trial. The state argues that the holding in *Witherspoon* was expressly limited to the discretionary sentencing function of a capital case jury. In such a situation the Supreme Court held that it was a violation of due process to execute a death sentence imposed by a jury from which those citizens who had general objections to the death penalty had been excluded. While the argument was presented before it, that Court in *Witherspoon* refused to find that a jury devoid of individuals who had misgivings about the imposition of capital punishment was unable to make a just determination of guilt or innocence.

The state points out that by virtue of amendments to the Criminal Code and the Code of Criminal Procedure, made after rendition of *Furman v. Georgia*, *supra*, the jury before which the defendant was tried did not have the discretion to impose either a death sentence or life imprisonment. (See La.R.S. 14:42, mandating the death sentence for aggravated rape; Art. 814, C.Cr.P. limiting an aggravated rape guilty verdict to the single finding, guilty as charged, although also responsive are the verdicts guilty of attempted aggravated rape, guilty of simple rape, or not guilty; and Art. 817, C.Cr.P., providing that "any qualification of or addition to a verdict of guilty . . . is without effect upon the finding.") Their sole function was to make a finding of guilt or innocence. Consequently, the state argues that *Witherspoon* was inapplicable.

Fundamentally, I believe the jury is actually and by law charged with a great responsibility as to the range of penalty imposed by its verdict of guilty on one of the responsive verdicts. When one verdict of the jury means death for the accused and another means life, we reason from formula and abstraction and not from human reality and responsibility if we say that the jury is not concerned with the penalty to be imposed as a result of the verdict it agrees on.

DIXON, Justice (concurring).

I concur in the opinion, with this exception: I respectfully dissent as to Assignment of Error No. 4, being of the opinion that the death penalty in Louisiana is violative of the *Furman* decision in that the jury possesses the uncontrolled discretion to return verdicts of guilty of lesser included offenses which do not carry the death penalty.

STATE of Louisiana

v.

Willie E. CALLIHAN.

No. 56237.

Supreme Court of Louisiana.

Oct. 1, 1975.

Rehearing Denied Oct. 31, 1975.

Defendant was convicted in the 21st Judicial District Court, Parish of Tangipahoa, Warren W. Comish, J., of manslaughter, and he brought an out-of-time appeal coupled with an application for a writ of habeas corpus. The Supreme Court, Dixon, J., held that where the defendant had been taken into custody and questioned with regard to the alleged offense without having been given Miranda warnings, and where defendant had volunteered to make a statement, the fact that a lawyer was called at such time to advise the defendant that he did not have to make any statements could not serve to render the statement made at that time admissible.

Reversed and remanded.

Sanders, C. J., dissented and filed an opinion and was of the opinion that a rehearing should be granted.

Summers and Marcus, JJ., dissented and were both of the opinion that a rehearing should be granted.

1. Criminal Law ⇐412.2(3)

An after-the-fact attempt to ritualize the safeguards of Miranda cannot be used to deprive the defendant of the very rights the Miranda decision sought to protect.

2. Criminal Law ⇐412.2(3)

Where defendant in murder prosecution, who had not been advised of his right to remain silent or to have an attorney present during questioning, was taken into custody by officers on June 28, 1966 after questioning in his home, was brought to jail and questioned further by officers about alleged offense, and subsequently told officers that he would make statement, fact that a lawyer was called at this point to advise the defendant that he did not have to make any statements could not serve to render statement made by defendant at that time admissible.

3. Criminal Law ⇐414

The burden is on the State to prove beyond a reasonable doubt that the legal requirements for the voluntariness of statements made during custodial interrogation were complied with.

4. Criminal Law ⇐412.2(3)

One of legal requirements for voluntariness of statements made during custodi

APPENDIX "B"

CRIMES AND OFFENSES—FORCIBLE RAPE

" ACT NO. 333

HOUSE BILL NO. 617

An Act to amend Title 14 of the Louisiana Revised Statutes of 1950, by adding thereto a new Section to be designated as Section 43.1, to provide for the establishment of the crime of forcible rape; to provide the penalty therefor; and to otherwise provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 43.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

§ 43.1 Forcible rape

Forcible rape is sexual intercourse without the lawful consent of the female where she is prevented from resisting the act by force or threats of physical violence wherein the victim reasonably believes her resistance to be useless.

Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than one nor more than twenty years.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed. "

Approved July 17, 1975.

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CRIMES AND OFFENSES—RAPE AND CRIME AGAINST NATURE

ACT NO. 612

SENATE BILL NO. 400

An Act to amend and reenact Sections 41, 42, 43 and 89 of Title 14 of the Louisiana Revised Statutes of 1950, and to amend said Title by adding thereto a new Section to be designated as R.S. 14:41.1, to provide that the crime of rape be defined on both heterosexual and homosexual terms; to provide that the crimes of simple rape and aggravated rape apply to both heterosexual and homosexual intercourse; and to provide that the definition of crime against nature exclude anal sexual intercourse when done under circumstances described in R.S. 14:41, 14:41.1, 14:42 or 14:43.

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 41, 42, 43 and 89 of Title 14 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Section 41.1 of said Title 14 is hereby enacted to read as follows:

§ 41. Rape; heterosexual; defined

Heterosexual rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime.

§ 41.1 Rape; homosexual; defined

Homosexual rape is the act of anal sexual intercourse with a male person committed without his consent. Emission is not necessary, and any anal sexual penetration, however slight, is sufficient to complete the crime.

§ 42. Aggravated rape

Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;

(2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution;

(3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death.

§ 43. Simple rape

Simple rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

(1) Where the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when victim has such incapacity,

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by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity;

(2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity.

(3) Where, in a case of heterosexual rape, the female person submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years.

§ 89. Crime against nature

Crime against nature is the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:41.1, 14:42, or 14:43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved July 17, 1975.

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AREA CODE 504

CRIMES AND OFFENSES—RESPONSIVE VERDICTS—AGGRAVATED RAPE

ACT NO. 334

HOUSE BILL NO. 618

An Act to amend and reenact Subparagraph 8 of Article 814 of the Louisiana Code of Criminal Procedure by adding thereto responsive verdicts for the crime of aggravated rape.

Be it enacted by the Legislature of Louisiana:

Section 1. Subparagraph 8 of Article 814 of the Louisiana Code of Criminal Procedure is hereby amended and reenacted to read as follows:

Art. 814. Responsible verdicts; in particular

* * *

8. Aggravated Rape:

Guilty; Guilty of attempted aggravated rape; Guilty of simple rape; Guilty of forcible rape; Guilty of attempted forcible rape; Not guilty

* * * * *

Section 2. If any provision or item of this Act, or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved July 17, 1975.

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